

53D GRADUATE COURSE
VICTIM/WITNESS ASSISTANCE

Table of Contents

I. REFERENCES.....	1
II. DEFINITIONS.....	2
III. CRIME VICTIM’S RIGHTS.....	2
IV. COMMAND RESPONSIBILITIES.	3
V. REPORTING REQUIREMENTS.....	9
VI. OTHER ASSISTANCE AVAILABLE TO VICTIMS.	9
VII. VICTIM ATTENDANCE AT COURT PROCEEDINGS.....	13
VIII. CASELAW DISCUSSING VICTIMS’ RIGHTS.....	13
IX. CONCLUSION.....	15
X. APPENDICES.....	a-i

MAJ Deidra J. Fleming
October 2004

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53D GRADUATE COURSE

VICTIM/WITNESS ASSISTANCE

Outline of Instruction

I. REFERENCES.

A. Primary.

1. Victim Rights Clarification Act of 1997, [18 U.S.C. § 3510](#) (2003).
2. Victim and Witness Protection Act of 1982, [18 U.S.C. §§ 1503](#), 1505, 1510, 1512-1515, 3146, 3579, 3580 (1988).
3. Victims of Crime Act of 1984, [42 U.S.C. §§ 10601-10603](#) (1988).
4. Victims' Rights and Restitution Act of 1990, [42 U.S.C. §§ 10606-10607](#) (2003).
5. [38 U.S.C. §1311-1314](#) (2003) (Dependency and Indemnity Compensation).
6. [10 U.S.C. §1059](#) (2003) (Transitional Compensation).
7. DoD Directive (DoD Dir.) 1030.1, Victim and Witness Assistance (April 13, 2004).
8. DoD Instruction (DoDI) 1030.2, Victim and Witness Assistance Procedures (June 4, 2004).
9. Dep't of Army, Reg. 27-10, Military Justice, ch. 18 (6 September 2002).
10. Dep't of Air Force Instruction (AFI) 51-201, Victim and Witness Assistance, ch. 7 (25 April 1997).
11. SECNAVINST 5800.11A, Victim and Witness Assistance Program (16 June 1995).
12. Marine Corps Order 5800.15A, Victim and Witness Assistance Program (VWAP) (3 September 1997).

B. Secondary.

1. Douglas K. Mickle, *The Army's Victim/Witness Assistance Program*, ARMY LAW., November 1994, at 3.
2. Warren G. Foote, *State Compensation for Victims of Crime*, ARMY LAW., March 1992, at 51.
3. Warren G. Foote, *Victim-Witness Assistance*, ARMY LAW., June 1991, at 63.
4. OTJAG POC: LTC (Ret) Charles Cosgrove, 1777 North Kent Street, 10th Floor, Rosslyn, VA 22209-2194; 703-588-6748 (Voice), 703-588-0144 (FAX); charles.cosgrove@hqda.army.mil.

II. DEFINITIONS.

A. **Victim:** a person who has suffered direct physical, emotional or pecuniary harm as the result of a commission of a crime in violation of the UCMJ (or in violation of the law of another jurisdiction if any portion of the investigation is conducted primarily by the DoD components), including but not limited to:

1. Military members and their family members;
2. When stationed OCONUS, DoD civilian employees and contractors, and their family members;
3. Institutional entity's representative (federal, state and local agencies are not eligible for services available to individual victims);
4. Victim under age 18, incompetent, incapacitated, or deceased (in order of preference): a spouse, legal guardian, parent, child, sibling, other family member, or court designated person.
5. Includes victims identified as a result of investigations of potential UCMJ violations conducted under the provisions of AR 15-6.

B. **Witness:** person who has information or evidence about a crime, and provides that knowledge to a DoD component about an offense within the component's investigative jurisdiction. If witness is a minor, includes a family member of legal guardian. BUT not a defense witness, perpetrator or accomplice.

III. CRIME VICTIM'S RIGHTS.

- A. Fair treatment and respect for dignity and privacy;
- B. Reasonable protection from accused;
- C. Notification of court proceedings;
- D. Presence at all public court proceedings related to the offense, unless court determines victim's testimony would be materially affected by other testimony;
- E. Confer with Government attorney;
- F. Receive available restitution; and
- G. Receive information about conviction, sentencing, imprisonment and release of accused.

IV. COMMAND RESPONSIBILITIES.

A. SJA's are designated as the "local responsible official" and have the following responsibilities:

1. Establish and supervise Victim/Witness Assistance Program within their GCM jurisdiction. Ensure establishment of local policies and procedures to accord crime victims' the rights described in the Bill of Rights above.
2. Establish a Victim and Witness Assistance Council where practical, to ensure interdisciplinary cooperation.
3. Designate, in writing, Victim/Witness Liaison (VWL).
 - a) Preference for a commissioned or warrant officer or civilian (GS-11 and above).
 - b) Exceptional circumstances allow SSG and above, or GS-6 and above.
 - c) VWL's should be outside the military justice section "to the extent permitted by resources."
 - d) To the extent resources permit, SJA's "should refrain from appointing attorneys as VWL's."

4. Establish Victim-Witness Assistance Council, to extent practicable, at “each significant military installation.”
5. Ensure Law Enforcement Agencies (LEA) inform victims and witnesses of VWL’s name, location and phone number.
6. TRAINING! Must ensure *annual* training is provided to all agencies involved in program. At a minimum, training will cover victims’ rights; available compensation through federal, state, and local agencies, providers’ responsibilities under the VWAP program, and requirements and procedures of AR 27-10, Chapter 18.
7. Ensure DoD Victim and Witness Bill of Rights is posted in office of commanders and agencies providing victim and witness assistance.
8. Establish separate waiting areas at courts-martial and other investigative proceedings. “In a deployed environment, victims and Government witnesses should be afforded a separate waiting area to the greatest extent practicable.”
9. Ensure victims and witnesses are advised that their interests are protected by administrative and criminal sanctions, i.e. obstruction of justice charges, etc., and that victims and witnesses should promptly report any attempted intimidation, harassment, or other tampering to military authorities.
10. Ensure appropriate law enforcement agencies are immediately notified in case where the life, well-being, or safety of a victim or witness is jeopardized by his or her participation in the criminal investigation or prosecution process.
11. Ensure victim’s and witness’ requests for investigative reports or other documents are processed under FOIA or Privacy Act.
12. Ensure DD Forms are distributed/completed.
13. Coordinate with criminal investigative agents to ensure all noncontraband property seized as evidence is safeguarded and returned; ensure victims are informed of applicable procedures for requesting return of property.
14. REPORTING REQUIREMENTS!! *See* Section V, below.

B. DD Forms (See Appendices).

1. DD Form 2701, Initial Information for Victims and Witnesses of Crime.

2. DD Form 2702, Court-Martial Information for Victims and Witnesses of Crime.
3. DD Form 2703, Post-Trial Information for Victims and Witnesses of Crime.
4. DD Form 2704, Victim/Witness Certification and Election Concerning Inmate Status.
5. DD Form 2705, Victim/Witness Notification of Confinee Status.
6. DD Form 2706, Annual Report on Victim and Witness Assistance.

C. Responsibilities (VWL, trial counsel, or other government representative).

1. VWL (recommended).
 - a) As soon as possible, but NLT appointment of Art. 32 Investigating Officer or referral of charges, ensure *victims and witnesses* are provided DD Form 2701 (Initial Information for Victims and Witnesses of Crime).
 - b) Inform *victim* of the place where the victim may receive emergency medical care and social service support.
 - c) Inform *victims* of where they can obtain financial, legal, and other support, including right to file Article 139 claim and right to transitional compensation, if applicable.
 - d) During investigation and prosecution of crime, *will provide* victims the earliest possible notice of significant events in the case, to include:
 - (1) Status of investigation of crime, with limits.
 - (2) Apprehension of suspected offender.
 - (3) Decision to prefer or dismiss charges.
 - (4) Initial appearance of suspect before pretrial confinement hearing or at Article 32, UCMJ investigation.
 - (5) Scheduling of each court proceeding victim is required or entitled to attend.

(6) Detention or release from detention of offender or suspected offender.

(7) Acceptance of plea of guilty or other verdict.

(8) Result of trial.

(9) If sentenced to confinement, probable parole date.

(10) General information regarding corrections process.

(11) Opportunity to consult with trial counsel concerning evidence in aggravation.

(12) How to submit victim impact statement to Army Clemency and Parole Board.

(13) The VWL will “make reasonable efforts to notify witnesses and representatives of witnesses, when applicable and at the earliest opportunity” of numbers one through ten above.

e) Advise *victims and witnesses* of protections from intimidation. See Military Protective Order, DD Form 2873 (appendices)

f) Act as intermediary between *victims and witnesses*, when requested, to arrange interviews by defense or government.

g) Advise victims on property return and restitution.

h) Notification of *victims’ and witness’* employers and creditors;

i) Witness fees and costs.

j) During trial and investigative proceedings, provide to *victims and witnesses*:

(1) Assistance in obtaining child care.

(2) Transportation/parking.

(3) Lodging.

(4) Separate waiting area outside presence of accused and defense witnesses.

(5) Translators/interpreters

k) Upon sentence to confinement provide *victims (and witnesses “adversely affected by the offender”)*:

(1) General information regarding post-trial procedures (DD Form 2703).

(2) Prepare DD Form 2704. Victims and witnesses elect whether they want notification of changes in inmate status. Ensure copy forwarded to confinement facility and ensure offender does not have access to copy of information.

2. Trial counsel (recommended).

a) Consult victims concerning:

(1) Decision not to prefer charges;

(2) Decisions concerning pretrial restraint or release;

(3) Pretrial dismissal of charges; and

(4) Negotiations of pretrial agreements and their potential terms.

Note: Victim does not have veto power over command’s decision on these matters; view is considered, not controlling.

b) Establish separate waiting areas at courts-martial and other investigative proceedings.

c) In coordination with SJA and CMCA, consider making restitution a term and condition of pretrial agreements. Also consider whether restitution was made when action is taken.

3. Commander, Confinement Facility.

a) Upon entry into confinement facility commander ensures receipt of DD Form 2704 and determines whether victim and/or witness requested

notification of changes in confinement status. If victim and/or witness so indicated, commander will advise of:

(1) Offender's place of confinement and minimum release date.

(2) Earliest possible notice of:

(a) Clemency/parole hearing dates.

(b) Transfer of inmate to another facility.

(c) Escape, recapture, or other form of release from confinement.

(d) Release from supervised parole.

(e) Death of inmate.

b) Forward DD Form 2704 if inmate is transferred.

c) Protect against disclosure to inmate of victim and witness addresses.

d) Reporting requirements as set forth below.

V. REPORTING REQUIREMENTS.

A. For each calendar year (CY), not later than 15 January or each year, SJA of each command having GCM jurisdiction must report:

1. The number of persons who received DD Forms 2701, 2702, 2703.
2. SJA's will obtain data for their reports from subordinate commands attached or assigned to their GCM jurisdiction for military justice purposes, including supported reserve component units.
3. Negative reports are required.
4. Use DD Form 2706.
5. Forward report through MACOM channels to Criminal Law Division, , HQDA, The Judge Advocate General, 1777 North Kent Street, 10th Floor, Rosslyn, VA 22209.

B. Other required reports (*Negative reports required*).

1. Military Police channels report the number of:
 - a) Victims and witnesses who received DD Form 2701 or 2702 from LEA personnel.
 - b) Victims and witnesses who were informed of their right (via DD Form 2704 or otherwise) to notification of changes in inmate status.
 - c) Victims and witnesses who were notified using DD Form 2705.
 - d) Confinees, by service, in Army facilities about whom victim/witness notifications must be made.
2. OTJAG Criminal Law prepares consolidated report for submission to DoD Under Secretary for Personnel and Readiness, Legal Policy Office.

VI. OTHER ASSISTANCE AVAILABLE TO VICTIMS.

A. Installation assistance. VWL will assist victim in contacting agencies or individuals responsible for providing necessary services and relief.

1. Command Chaplain.
2. Family Advocacy Center/Army Community Service.
3. Emergency Relief Funds.
4. Legal Assistance, if appropriate.
5. American Red Cross.
6. If victims are not eligible for military services, or where military services are not available, "the VWL will provide liaison assistance in seeking any available nonmilitary services within the civilian community."

B. Pretrial Agreements - negotiated restitution.

C. Transportation and shipment of household goods. (See JFTR).

D. State and local assistance.

E. Transitional Compensation. [10 U.S.C. § 1059](#); DoD Instruction 1342.24 (23 May 1995); DoD Instruction 1342.24, Change 1 (May 1997); AR 608-1, *Army Community Service*, (20 November 2003).

1. Dependent-abuse offenses resulting in separation of servicemember from active duty or total forfeiture of all pay and allowances pursuant to court-martial conviction or administrative separation.

a) Applies to cases on or after 30 November 1993.

b) Applies to voluntary and involuntary separation proceedings (example: discharge in lieu of trial by court-martial UP Chapter 10, AR 635-200).

c) **Dependent-abuse offenses** - conduct by an individual while a member of the armed forces on active duty for a period of more than thirty days that involves abuse of the then-current spouse or dependent child of the member and that is a criminal offense defined by the Uniform Code of Military Justice or other criminal code applicable to the jurisdiction where the act of abuse is committed. Offenses that may qualify as dependent abuse offenses include sexual assault, rape, sodomy, assault, battery, murder, and manslaughter. This is not an exhaustive listing of dependent abuse offenses.

d) **Dependent Child.** An unmarried child, including an adopted child or stepchild, who was residing with the member at the time of the dependent abuse offense and who is

(1) Under 18 years of age;

(2) Eighteen or older and incapable of self-support because of mental or physical incapacity that existed prior to age 18 and who is dependent on the member for over one-half of the child's support;

(3) 18 or older, but less than 23, and is a college student and who is dependent on the member for over one-half of the child's support.

2. Compensation.

a) Duration of payments dependent upon the unserved portion of the member's obligated active duty service (no less than 12 months, but no more than 36 months).

b) Start-date: date sentence is adjudged if the sentence, as adjudged, includes a dismissal, dishonorable discharge, bad conduct discharge, or forfeiture of all pay and allowances; or

c) However, if there is a pretrial agreement that provides for disapproval or suspension of a dismissal, dishonorable discharge, bad conduct discharge, or forfeiture of all pay and allowances, then start date is the date of the approval of the court-martial sentence if the sentence, as approved, includes an unsuspended dismissal, dishonorable discharge, bad conduct discharge, or forfeiture of all pay and allowances; or,

d) If pursuant to administrative separation, the date of initiation of separation proceedings.

e) Amount of compensation increases with each dependent. See [38 U.S.C. § 1311\(a\)\(1\)](#).

f) Dependent loses payments if remarries or cohabitates with abuser, or is an active participant in the abuse.

g) Payment stops if administrative separation is disapproved.

h) Payment stops if dismissal, dishonorable discharge, of bad-conduct discharge is remitted, set aside, or mitigated to a lesser punishment that does not include any such punishment.

i) Application for transitional compensation: individual submits request through military service of member.

j) Requires annual certification of entitlement to funds by spouse and dependent children.

k) Payment is from Operation and Maintenance Funds. Defense Finance and Accounting Service issues the payments, and administrative oversight of the funds (approval of payments and such) is through the Community and Family Support Center (CFSC), a DA level organization.

3. Other benefits –

a) Commissary and exchange privileges for length of time eligible for transitional compensation;

b) Medical and dental care for up to one year for injuries related to dependent abuse offense(s). Applies to dependents of a member separated due to dependent abuse offense (includes discharge as result of conviction as well as administrative separation).

F. UCMJ, art 58b.

1. “Waiver” of forfeitures of pay and allowances to dependents.

2. Maximum period is six months.

3. Request does not have to be made by accused; may be made by dependents or someone (VWL) on behalf of dependents.

G. UCMJ, art. 139.

1. Redress of injuries to property.

2. Willful damage or theft.

3. No conviction is required.

VII. VICTIM ATTENDANCE AT COURT PROCEEDINGS

A. Military Rule of Evidence 615 (Exclusion of Witnesses) prohibits the military judge from sequestering certain categories of witnesses to prevent them from hearing the testimony of other witnesses, including: “(4) a person authorized by statute to be present at courts-martial, or (5) any victim of an offense from the trial of an accused for that offense because such victim may testify or present any information in relation to the sentence or that offense during the presentencing proceedings.” These provisions of the Military Rules of Evidence were effective on 15 May 2002.

B. Subparagraph 4 extends to victims at courts-martial the same rights granted to victims by the Victims’ Rights and Restitution Act of 1990, [42 U.S.C. §10606\(b\)\(4\)](#). That statute gives crime “victims” “the right to be present at all public proceedings related to the offense, unless the court determines that testimony by the victim would be materially affected if the victim heard the testimony at trial.”

C. Subparagraph 5 implements the Victims Rights Clarification Act of 1997, [18 U.S.C. §3510](#), and basically prohibits the military judge from sequestering a “victim” who will only testify in the presentencing proceeding. This section does not incorporate the balancing test of subparagraph 4, and does not permit the military judge to sequester a victim who will testify only on sentencing even where that victim’s testimony may be materially affected by hearing other testimony at trial.

1. The Victim Rights Clarification Act was passed in response to the federal district court judge’s ruling in the Oklahoma City bombing trial of Timothy McVeigh that precluded victims from attending the trial proceedings on the grounds that their victim impact testimony on sentencing would be materially affected by observing other parts of the trial on the merits.

D. A “victim” for purposes of Mil. R. Evid. 615 is defined as “a person who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of a crime, including (A) in the case of a victim that is an institutional entity, an authorized representative of the entity; and (B) in the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, one of the following (in order of preference): (i) a spouse; (ii) a legal guardian; (iii) a parent; (iv) a child; (v) a sibling; (vi) another family member; or (vii) another person designated by the court.”

E. The rules allowing victims to remain in the courtroom are subject to other rules, such as those regarding classified information, witness deportment, and conduct in the courtroom.

F. See Appendix 2 for further analysis of these changes

VIII. CASELAW DISCUSSING VICTIMS’ RIGHTS

A. *Saum v. Widnall*, [912 F. Supp. 1384](#) (D. Col 1996). A female Air Force Academy cadet sued the Secretary of the Air Force and others seeking declaratory and injunctive relief based on alleged sexual harassment during training, in violation of her due process and equal protection rights. The alleged harassment included a videotaped simulated “rape and exploitation” scenario as part of SERE (survival, evasion, resistance, and escape) training, during which she received injuries requiring medical attention. As part of her requested relief, plaintiff sought a declaratory judgment that she is a “crime victim” as defined by the Victims’ Rights and Restitution Act of 1990 and DoD 1030.2. The Air Force argued that her claim should be dismissed because there is no private right of action under the Victims Rights Act. The court found that argument “without merit,” and denied the Air Force’s motion to dismiss. Although the court determined that the government “is not required to do anything under the Victims’ Rights Act in the absence of an ongoing criminal investigation,” if the Air Force was required to have launched such an investigation under the circumstances presented, Cadet Saum may be entitled to relief. Cadet Saum and the Air Force settled the case and it was dismissed with prejudice in 1997. *Saum v. Widnall*, [959 F.Supp. 1310](#) (D. Col. 1997).

B. *United States v. Rorie*, [58 M.J. 399](#) (2003). CAAF overturns 53 years of precedent and holds that it will no longer follow a policy of *abatement ab initio* for appellants who die following review by the intermediate service courts but prior to final review by the Court of Appeals for the Armed Forces. The rationale for overturning the abatement policy rested on two grounds: first, even after the death of a military defendant “there remains a substantial punitive interest in preserving otherwise lawful and just military convictions”; and second, the impact of abatement *ab initio* on victims’ rights, and, in particular, the issue of restitution as a condition of a pretrial agreements, reduced sentence, clemency, or parole. “Particularly where there has been one level of appeal of right, abatement *ab initio* at this level frustrates a victim’s legitimate interest in restitution and compensation.”

C. *United States v. Spann*, [51 M.J. 89](#) (1999). The Victim Rights and Restitution Act of 1990, and the Victim Rights Clarification Act of 1997, amending F.R.E. 615, did not apply to the military prior to the dates those changes would automatically become effective under Mil. R. Evid. 1102 (18 months after the effective date in the federal system). As it happens, the President enacted changes to Mil. R. Evid. 615, effective 15 May 2002 (adding subparts 4 and 5, discussed above), which differed somewhat from the F.R.E. amendment.

D. *United States v. Lundy*, [60 M.J. 52](#) (2004). Accused entered into PTA term, whereby the CA agreed to defer any and all reductions and forfeitures until the sentence was approved and suspend all adjudged and waive any and all automatic reductions and forfeitures. For sexually assaulting his children, the Accused (a SSG) was sentenced to a DD, confinement for 23 years, and reduction to E-1, which subjected him to automatic reduction and forfeitures. The CA attempted to suspend the automatic reduction IAW the PTA to provide the Accused’s family with waived forfeitures at the E-6, as opposed to the E-1, rate. The parties, however, overlooked AR 600-8-19 which precludes a CA from suspending an automatic reduction unless the CA also suspends any related confinement

or discharge which triggered the automatic reduction. ACCA stated no remedial action was required because the Accused's family was adequately compensated with transitional compensation (TC), which ACCA concluded the Accused's family was not entitled to because they were receiving waived forfeitures, albeit at the E-1 rate. The CAAF, in reversing, held if a material term of a PTA is not met by the government three options exist: (1) the government's specific performance of the term; (2) withdrawal by the accused from the PTA, or (3) alternative relief, if the accused consents to such relief. Additionally, the CAAF held an Accused's family could receive TC while receiving either deferred or waived forfeitures if the receipt of TC was based on a discharge and if the receipt of TC was based only on the Accused receiving forfeitures, the family could receive TC if not actively receiving the deferred or waived forfeitures. Case remanded to determine if the Gov't could provide specific performance.

E. *United States v. Bright*, [44 M.J. 749](#) (C.G. Ct. Crim. App. 1996). Appellant was convicted of larceny of BAH and false official statements. Appellant's wife submitted an adverse letter to the convening authority, purportedly "in the spirit of the DoD Victim and Witness Assistance Program implementing the Victims' Rights and Restitution Act of 1990." Appellant contended on appeal that his estranged wife was not a "victim" in any sense of the word as it is defined in the relevant victim rights statutes. The court held that, while appellant may be correct, the convening authority was permitted to consider the letter upon some other basis, so long as appellant was notified properly by the SJA addendum. Further, the court held that although there may be limits to what the convening authority could consider, by failing to challenge the appropriateness of the letter at the time it was served upon him, the appellant waived the issue.

F. *United States v. Ducharme*, [59 M.J. 816](#) (N-M. Ct. Crim. App. 2004). Appellant was tried in July, 1999, prior to the effective date of changes to MRE 615 permitting sentencing witnesses to observe trial on the merits (the effective date of those changes is 15 May 2002). The court held that the military judge did not err when he ruled that, under Mil. R. Evid. 806 (control of spectators), one of the government's sentencing witnesses (negligent homicide victim's mother) could remain in the courtroom throughout trial. In addition, under Mil. R. Evid. 615 as it existed at the time of appellant's trial which required sequestration of witnesses upon request of either party, the trial defense counsel waived the issue. Finally, even assuming the military judge erred under Mil. R. Evid. 615 as it existed at the time of appellant's trial, any error was harmless.

IX. CONCLUSION.

53D GRADUATE COURSE

VICTIM/WITNESS ASSISTANCE

APPENDICES

1. DD Form 2873 (Military Protective Order) and attached memorandum.
2. Changes to Manual for Courts-Martial, United States, Mil. R. Evid. 615 (2002) (including analysis to Mil. R. Evid. 615; Notes of Federal Rules Advisory Committee to F.R.E. 615; Commentary by Professor Saltzburg in United States Code Service; and Comment by Professor Saltzburg, et.al. in Federal Rules of Evidence Manual).
3. Changes to Transitional Compensation Rules contained in National Defense Authorization Act of 2004 and OTJAG Crim Law Information Paper Concerning Same
4. Victim-Witness Checklist (Appendix D, AR 27-10)
5. DD Form 2701, Initial Information for Victims and Witnesses of Crime.
6. DD Form 2702, Court-Martial Information for Victims and Witnesses of Crime.
7. DD Form 2703, Post-Trial Information for Victims and Witnesses of Crime.
8. DD Form 2704, Victim/Witness Certification and Election Concerning Inmate Status.
9. DD Form 2705, Victim/Witness Notification of Confinee Status.
10. DD Form 2706, Annual Report on Victim and Witness Assistance.
11. EXSUM from DoD Task Force Report on Care for Victims of Sexual Assault, April 2004.
12. EXSUM from DA Task Force Report on Sexual Assault Policies, 27 May 2004.

APPENDIX 1

MILITARY PROTECTIVE ORDER AND MEMORANDUM

APPENDIX 2

MRE 615 -- Expanding Exceptions to the Sequestration Rule

Effective 15 May 2002

1. The rule: Part III of the Manual for Courts-Martial, United States, is amended in Mil. R. Evid. 615 by striking the period at the end of the rule and adding ", or (4) a person authorized by statute to be present at courts-martial, or (5) any victim of an offense from the trial of an accused for that offense because such victim may testify or present any information in relation to the sentence or that offense during the presentencing proceedings."

2. Changes to Appendix 22, the Analysis Accompanying the Military Rules of Evidence (Part III, MCM).

c. The analysis to Mil. R. Evid. 615 is amended by adding at the end the following new paragraph:

"2002 Amendment: These changes are intended to extend to victims at courts-martial the same rights granted to victims by the Victims' Rights and Restitution Act of 1990, [42 U.S.C. § 10606](#)(b)(4), giving crime victims '[t]he right to be present at all public court proceedings related to the offense, unless the court determines that testimony by the victim would be materially affected if the victim heard other testimony at trial,' and the Victim Rights Clarification Act of 1997, [18 U.S.C. § 3510](#), which is restated in subsection (5). For the purposes of this rule, the term 'victim' includes all persons defined as victims in [42 U.S.C. § 10607](#)(e)(2), which means 'a person that has suffered direct physical, emotional, or pecuniary harm as a result of the commission of a crime, including—(A) in the case of a victim that is an institutional entity, an authorized representative of the entity; and (B) in the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, one of the following (in order of preference): (i) a spouse; (ii) a legal guardian; (iii) a parent; (iv) a child; (v) a sibling; (vi) another family member; or (vii) another person designated by the court. 'The victim's right to remain in the courtroom remains subject to other rules, such as those regarding classified information, witness department, and conduct in the courtroom. Subsection (4) is intended to capture only those statutes applicable to courts-martial."

3. Notes of Advisory Committee on 1998 amendments. The amendment is in response to: (1) the Victim's Rights and Restitution Act of 1990, [42 U.S.C. § 10606](#), which guarantees, within certain limits, the right of a crime victim to attend the trial; and (2) the Victim Rights Clarification Act of 1997 ([18 U.S.C. § 3510](#)).

4. Commentary by Saltzburg in USCS

In 1990, Congress enacted the "Victim of Crime Bill of Rights," [42 USCS § 10606](#), which provides several protections for victims of crime. This statute was enacted partly in response to a concern that victim-witnesses would be routinely excluded from criminal proceedings. Accordingly, subdivision (b)(4) of the Victim's Bill of Rights establishes the right "to be present at all public court proceedings related to the offense, unless the court determines that testimony by the victim would be materially affected if the victim heard other testimony at trial." It is clear that Congress intended in the Victim's Bill of Rights to create an exception to Rule **615** for crime victims. Under [42 USCS § 10606\(b\)\(4\)](#), a Trial Judge has no right to automatically exclude every victim-witness, as would be the case under Rule **615**. Instead, the Judge must determine whether the testimony of the victim will be not only affected but "materially affected" by hearing other testimony. Given the public access to information, especially in high profile criminal cases, a Trial Judge will be hard-pressed to conclude that a victim's presence at trial will "materially affect" their testimony.

As part of another package furthering victim's rights, Congress enacted "The Victim Rights Clarification Act of 1997." The law adds section 3510 to Title 18, and provides that notwithstanding any other law or Rule (including of course Rule **615**), a Court "shall not order any victim of an offense excluded from the trial of a defendant accused of that offense because such victim may, during the sentencing hearing, make a statement or present any information in relation to the sentence." After the Victim Rights Clarification Act, the Trial Court has no authority to exclude a victim from trial on the ground that the victim's presence at trial might taint his testimony at a sentencing proceeding.

Because Rule **615** has essentially been superseded by legislation at least in the area of sequestration of crime victims, the Supreme Court approved an amendment to Rule **615** that adds an exception to the Rule **615** sequestration power for any person "whose presence is authorized by statute." Unless Congress acts to change or reject the Supreme Court's proposal, this change will become effective on December 1, 1998.

5. Comment by Saltzburg et al. in Federal Rule of Evidence Manual:

Victims of crime

The December 1, 1998, amendment to Rule **615** described in the Official Text, *supra*, provides an exception to sequestration for crime victims in accordance with victim rights legislation.

Federal Rule **615** could obviously have an impact on a victim of a crime in the context of a criminal trial. The victim will often be a witness, and will often have an emotional and psychological interest in attending all trial proceedings. Such a victim is subject to sequestration under the terms of Rule **615**. The exceptions to Rule **615**, as they stand at this writing, are essentially inapplicable to crime victims; the victim is not a party, and it would be the rare case where the prosecutor could show that the victim fit the exception

to Rule **615** for a witness whose presence prior to his testimony is essential to the presentation of the case.

In 1990, Congress enacted the "Victim of Crime Bill of Rights," [42 U.S.C. § 10606](#), which provides several protections for victims of crime. This statute was enacted partly in response to a concern that victim-witnesses would be routinely excluded from criminal proceedings. Accordingly, subdivision (b)(4) of the Victim's Bill of Rights establishes the right "to be present at all public court proceedings related to the offense, unless the court determines that testimony by the victim would be materially affected if the victim heard other testimony at trial." (It is to be noted that subdivision (c) of the statute states that no cause of action or defense is created from the failure of the government to accord the enumerated rights.) N 21

N 21 [42 U.S.C. § 10606](#) provides several protections for victims of crime. The statute provides in full as follows:

10606 Victims rights

(a) Best efforts to accord rights. Officers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that victims of crime are accorded the rights described in subsection (b).

(b) Rights of crime victims. A crime victim has the following rights:

(1) The right to be treated with fairness and with respect for the victims dignity and privacy.

(2) The right to be reasonably protected from the accused offender.

(3) The right to be notified of court proceedings.

(4) The right to be present at all public court proceedings related to the offense, unless the court determines that testimony by the victim would be materially affected if the victim heard other testimony at trial.

(5) The right to confer with an attorney for the Government in the case.

(6) The right to restitution.

(7) The right to information about the conviction, sentencing, imprisonment, and release of the offender.

(c) No cause of action or defense. This section does not create a cause of action or defense in favor of any person arising out of the failure to accord to a victim the rights enumerated in subsection (b).

It is clear that Congress intended in the Victim's Bill of Rights to create an exception to Rule **615** for crime victims. This exception, which is narrowly tailored to take account of the interests of crime victims and is more recently enacted than the Rule, takes precedence over Rule **615**.

As we read [42 U.S.C. § 10606](#) (b)(4), a Trial Judge has no right to automatically exclude every victim-witness, as would be the case under Rule **615**. Instead, the Judge must determine whether the testimony of the victim will be not only affected but "materially affected" by hearing other testimony. The use of the word "materially" imposes a difficult task on a Trial Judge, especially in light of the ordinary discovery that is mandated in criminal cases. Fed. R. Crim. P. 16 does not require the government to reveal names of witnesses or to disclose the expected nature of their testimony. Nor does it require the government to produce statements of witnesses. The Jencks Act, [18 U.S.C. § 3500](#), does not require the government to turn over statements of testifying witnesses until they have given direct examination. Recent attempts to expand discovery through the rulemaking process were unsuccessful. Thus, a Trial Judge called upon to determine the effect of other testimony on a victim often will be largely in the dark unless the Judge believes it is fair to consider an ex parte, in camera submission by the government, or the government is prepared to reveal names and expected testimony of witnesses prior to trial. Many Judges will be uncomfortable with an ex parte, in camera submission, and many prosecutors will be reluctant to provide the defense with expanded discovery simply to enable a ruling on a sequestration matter. Since the victim of crime is an important witness in most cases, and since exploring inconsistencies between a victim's testimony and that of other witnesses is a crucial part of the defense in many cases, a Trial Judge might conclude that if the victim hears trial testimony, the victim's testimony would be materially affected. This is especially likely if the Judge concludes that elimination of inconsistencies in the testimony of various witnesses would be a material change in the prosecution's case. Thus, even under the statute, victims of crime will sometimes be sequestered - just not as often as would be the case under Rule **615**. Sequestration would not be appropriate in high profile trials, however. In those cases, a victim-witness will hear about courtroom testimony through a variety of sources, and a Judge would be hard-pressed to find that the victim's testimony would be materially affected by her presence in the courtroom.

Even if sequestration is ordered under the statute, this does not mean that crime victims should be sequestered for any substantial part of a criminal trial. Any conscientious prosecutor dealing with a victim who wishes to be present at public Court proceedings related to that victim's harm should, under subdivision (a) of the statute

(requiring officials of the Justice Department to make their best efforts to protect victims' rights), make his or her best effort to call the victim first and then argue that the victim has a right to remain in the courtroom during the rest of the trial. The argument is that, once the victim's testimony is completed, there no longer is a good reason to exclude the victim. In some rare cases, the Trial Judge may conclude that there may be a need for the defendant to recall the victim, that the evidence presented in the interim would materially affect the victim's testimony on recall, and that the defendant should not be compelled to decide whether to elicit additional testimony at the outset of the government's case. In such cases, the prosecutor who called the victim as the first witness would have satisfied the statutory requirement of best efforts, even though the victim might be excluded from the courtroom even after testifying. In most cases, however, the victim should be able to remain in the courtroom after testifying.

Should a prosecutor fail to seek to have the victim testify first, the Judge should exercise the power conferred by Rule 611(a) to control the order of proof, and require the victim to be the first witness if the victim has expressed a desire to attend the trial. The Judge could even call the victim as the first witness by using the power conferred by Rule 614, although it is difficult to believe that this ought to be a preferred procedure.

Whether the prosecutor requests or the Judge orders that the victim testify first, the result is that in all but the most unusual cases the victim should be able to be present during virtually the entire trial. This result is consistent with Congress' goals in enacting the Victims' Bill of Rights.

In the Oklahoma City bombing trial, United States v. McVeigh, the defendant sought to exclude victims on the ground that they planned to testify at the sentencing hearing. The defense argued that the victims' presence at the trial would materially affect their testimony at the later proceeding. The Trial Judge agreed with the defendant and entered an order excluding from the trial any victims who planned to give victim impact statements at the sentencing hearing. This left the victims in a quandary: to attend the trial, they would essentially have to waive their right to give a victim impact statement at the sentencing hearing.

Congress responded with legislation entitled "The Victim Rights Clarification Act of 1997." The law adds section 3510 to Title 18, and provides that notwithstanding any other law or Rule (including of course Rule **615**), a Court "shall not order any victim of an offense excluded from the trial of a defendant accused of that offense because such victim may, during the sentencing hearing, make a statement or present any information in relation to the sentence."

After the Victim Rights Clarification Act, the Trial Court has no authority to exclude a victim from trial on the ground that the victim's presence at trial might taint his testimony at a sentencing proceeding. At any rate, it is quite unlikely that a victim's presence at trial would ever taint her sentencing hearing testimony. The issues at trial and sentencing are so different that the risks of taint are remote.

Because Rule **615** has essentially been superseded by legislation at least in the area of sequestration of crime victims, the Advisory Committee on the Federal Rules of Evidence has proposed that the Rule be amended. The Advisory Committee's proposal reads:

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause, or (4) a person whose presence is authorized by statute.

The intent of the proposal is to accommodate both the existing Victim's Rights legislation, as well as any future legislation, such as the current proposal in Congress to provide crime victims an absolute right of presence in the courtroom. The above proposal to amend Rule **615** has been approved by the Judicial Conference and submitted to the Supreme Court. If the Supreme Court approves the amendment, and Congress does not act, the amendment will become effective on December 1, 1998.

APPENDIX 3

P.L. 108-106

National Defense Authorization Act for Fiscal Year 2004

Subtitle G--Domestic Violence

SEC. 571. TRAVEL AND TRANSPORTATION FOR DEPENDENTS RELOCATING FOR REASONS OF PERSONAL SAFETY.

Section 406(h) of title 37, United States Code, is amended by adding at the end the following new paragraph:

`(4)(A) If a determination described in subparagraph (B) is made with respect to a dependent of a member described in that subparagraph and a request described in subparagraph (C) is made by or on behalf of that dependent, the Secretary may provide a benefit authorized for a member under paragraph (1) or (3) to that dependent in lieu of providing such benefit to the member.

`(B) A determination described in this subparagraph is a determination by the commanding officer of a member that--

`(i) the member has committed a dependent-abuse offense against a dependent of the member;

`(ii) a safety plan and counseling have been provided to that dependent;

`(iii) the safety of the dependent is at risk; and

`(iv) the relocation of the dependent is advisable.

`(C) A request described in this subparagraph is a request by the spouse of a member, or by the parent of a dependent child in the case of a dependent child of a member, for relocation.

`(D) Transportation may be provided under this paragraph for household effects or a motor vehicle only if a written agreement of the member, or an order of a court of competent jurisdiction, gives possession of the effects or vehicle to the spouse or dependent of the member concerned.

`(E) In this paragraph, the term 'dependent-abuse offense' means an offense described in section 1059(c) of title 10.'

SEC. 572. COMMENCEMENT AND DURATION OF PAYMENT OF TRANSITIONAL COMPENSATION.

(a) COMMENCEMENT- Paragraph (1)(A) of section 1059(e) of title 10, United States Code, is amended by striking `shall commence' and all that follows and inserting `shall commence--

`(i) as of the date the court-martial sentence is adjudged if the sentence, as adjudged, includes a dismissal, dishonorable discharge, bad conduct discharge, or forfeiture of all pay and allowances; or

`(ii) if there is a pretrial agreement that provides for disapproval or suspension of the dismissal, dishonorable discharge, bad conduct discharge, or forfeiture of all pay and allowances, as of the date of the approval of the court-martial sentence by the person acting under section 860(c) of this title (article 60(c) of the Uniform Code of Military Justice) if the sentence, as approved, includes an unsuspended dismissal, dishonorable discharge, bad conduct discharge, or forfeiture of all pay and allowances; and'.

(b) DURATION- (1) Paragraph (2) of such section is amended by striking `a period of 36 months' and all that follows through `12 months' and inserting `a period of not less than 12 months and not more than 36 months, as established in policies prescribed by the Secretary concerned'.

(2) Policies under subsection (e)(2) of section 1059 of title 10, United States Code, as amended by paragraph (1), for the duration of transitional compensation payments under that section shall be prescribed under such subsection not later than six months after the date of the enactment of this Act.

(c) TERMINATION- Paragraph (3)(A) of such section is amended by striking `punishment applicable to the member under the sentence is remitted, set aside, or mitigated' and inserting `conviction is disapproved by the person acting under section 860(c) of this title (article 60(c) of the Uniform Code of Military Justice) or set aside, or each such punishment applicable to the member under the sentence is disapproved by the person acting under section 860(c) of this title, remitted, set aside, suspended, or mitigated'.

(d) EFFECTIVE DATE- The amendments made by this section shall apply only with respect to cases in which a court-martial sentence is adjudged on or after the date of the enactment of this Act.

SEC. 573. EXCEPTIONAL ELIGIBILITY FOR TRANSITIONAL COMPENSATION.

(a) AUTHORITY- Section 1059 of title 10, United States Code, is amended by adding at the end the following new subsection:

`(m) EXCEPTIONAL ELIGIBILITY FOR DEPENDENTS OF FORMER MEMBERS-

(1) The Secretary concerned, under regulations prescribed under subsection (k), may authorize eligibility for benefits under this section for dependents and former dependents of a former member of the armed forces in a case in which the dependents or former dependents are not otherwise eligible for such benefits and the Secretary concerned determines that the former member engaged in conduct that is a dependent-abuse offense under this section and the former member was separated from active duty other than as described in subsection (b).

`(2) In a case in which the Secretary concerned, under the authority of paragraph (1), authorizes benefits to be provided under this section, such benefits shall be provided in the same manner as if the former member were an individual described in subsection (b), except that, under regulations prescribed under subsection (k), the Secretary shall make such adjustments to the commencement and duration of payment provisions of subsection (e), and may make adjustments to other provisions of this section, as the Secretary considers necessary in light of the circumstances in order to provide benefits substantially equivalent to the benefits provided in the case of an individual described in subsection (b).

`(3) The authority of the Secretary concerned under paragraph (1) may not be delegated.'.

(b) EFFECTIVE DATE- The authority under subsection (m) of section 1059 of title 10, United States Code, as added by subsection (a), may be exercised with respect to eligibility for benefits under that section only for dependents and former dependents of individuals who are separated from active duty in the Armed Forces on or after the date of the enactment of this Act.

SEC. 574. TYPES OF ADMINISTRATIVE SEPARATIONS TRIGGERING COVERAGE.

Section 1059(b)(2) of title 10, United States Code, is amended by inserting `, voluntarily or involuntarily,' after `administratively separated'.

SEC. 575. COMPTROLLER GENERAL REVIEW AND REPORT.

(a) REVIEW- During the two-year period beginning on the date of the enactment of this Act, the Comptroller General shall review and assess the progress of the Department of Defense in implementing the recommendations of the Defense Task Force on Domestic Violence. In reviewing the status of the Department's efforts, the Comptroller General should specifically focus on--

(1) the efforts of the Department to ensure confidentiality for victims and accountability and education of commanding officers and chaplains; and

(2) the resources that the Department of Defense has provided toward such implementation, including personnel, facilities, and other administrative support, in order to ensure that necessary resources are provided to the organization within the Office of

the Secretary of Defense with direct responsibility for oversight of implementation by the military departments of recommendations of the Task Force in order for that organization to carry out its duties and responsibilities.

(b) REPORT- The Comptroller General shall submit to the Committee on Armed Services of the Senate and the Committee on Armed Services of the House of Representatives a report on the results of the review and assessment under subsection (a) not later than 30 months after the date of the enactment of this Act.

SEC. 576. FATALITY REVIEWS.

(a) ARMY- (1) Part II of subtitle B of title 10, United States Code, is amended by adding at the end the following new chapter:

`CHAPTER 375--MISCELLANEOUS INVESTIGATION REQUIREMENTS AND OTHER DUTIES

`Sec.

`4061. Fatality reviews.

`Sec. 4061. Fatality reviews

`(a) REVIEW OF FATALITIES- The Secretary of the Army shall conduct a multidisciplinary, impartial review (referred to as a `fatality review') in the case of each fatality known or suspected to have resulted from domestic violence or child abuse against any of the following:

`(1) A member of the Army on active duty.

`(2) A current or former dependent of a member of the Army on active duty.

`(3) A current or former intimate partner who has a child in common or has shared a common domicile with a member of the Army on active duty.

`(b) MATTERS TO BE INCLUDED- The report of a fatality review under subsection (a) shall, at a minimum, include the following:

`(1) An executive summary.

`(2) Data setting forth victim demographics, injuries, autopsy findings, homicide or suicide methods, weapons, police information, assailant demographics, and household and family information.

`(3) Legal disposition.

`(4) System intervention and failures, if any, within the Department of Defense.

`(5) A discussion of significant findings.

`(6) Recommendations for systemic changes, if any, within the Department of the Army and the Department of Defense.

`(c) OSD GUIDANCE- The Secretary of Defense shall prescribe guidance, which shall be uniform for the military departments, for the conduct of reviews by the Secretary under subsection (a).'

(2) The tables of chapters at the beginning of subtitle B, and at the beginning of part II of subtitle B, of such title are each amended by inserting after the item relating to chapter 373 the following new item:
4061'.

(b) NAVY AND MARINE CORPS- (1) Chapter 555 of title 10, United States Code, is amended by adding at the end the following new section:

`Sec. 6036. Fatality reviews

`(a) REVIEW OF FATALITIES- The Secretary of the Navy shall conduct a multidisciplinary, impartial review (referred to as a 'fatality review') in the case of each fatality known or suspected to have resulted from domestic violence or child abuse against any of the following.

`(1) A member of the naval service on active duty.

`(2) A current or former dependent of a member of the naval service on active duty.

`(3) A current or former intimate partner who has a child in common or has shared a common domicile with a member of the naval service on active duty.

`(b) MATTERS TO BE INCLUDED- The report of a fatality review under subsection (a) shall, at a minimum, include the following:

`(1) An executive summary.

`(2) Data setting forth victim demographics, injuries, autopsy findings, homicide or suicide methods, weapons, police information, assailant demographics, and household and family information.

`(3) Legal disposition.

`(4) System intervention and failures, if any, within the Department of Defense.

`(5) A discussion of significant findings.

`(6) Recommendations for systemic changes, if any, within the Department of the Navy and the Department of Defense.

`(c) OSD GUIDANCE- The Secretary of Defense shall prescribe guidance, which shall be uniform for the military departments, for the conduct of reviews by the Secretary under subsection (a).'

(2) The table of sections at the beginning of such chapter is amended by adding at the end the following new item:

`6036. Fatality reviews.'

(c) AIR FORCE- (1) Part II of subtitle D of such title is amended by adding at the end the following new chapter:

`CHAPTER 875--MISCELLANEOUS INVESTIGATION REQUIREMENTS AND OTHER DUTIES

`Sec.

`9061. Fatality reviews.

`Sec. 9061. Fatality reviews

`(a) REVIEW OF FATALITIES- The Secretary of the Air Force shall conduct a multidisciplinary, impartial review (referred to as a `fatality review') in the case of each fatality known or suspected to have resulted from domestic violence or child abuse against any of the following:

`(1) A member of the Air Force on active duty.

`(2) A current or former dependent of a member of the Air Force on active duty.

`(3) A current or former intimate partner who has a child in common or has shared a common domicile with a member of the Air Force on active duty.

`(b) MATTERS TO BE INCLUDED- The report of a fatality review under subsection (a) shall, at a minimum, include the following:

`(1) An executive summary.

`(2) Data setting forth victim demographics, injuries, autopsy findings, homicide or suicide methods, weapons, police information, assailant demographics, and household and family information.

`(3) Legal disposition.

`(4) System intervention and failures, if any, within the Department of Defense.

`(5) A discussion of significant findings.

`(6) Recommendations for systemic changes, if any, within the Department of the Air Force and the Department of Defense.

`(c) OSD GUIDANCE- The Secretary of Defense shall prescribe guidance, which shall be uniform for the military departments, for the conduct of reviews by the Secretary under subsection (a).'

(2) The tables of chapters at the beginning of subtitle D, and at the beginning of part II of subtitle D, of such title are each amended by inserting after the item relating to chapter 873 the following new item:

9061'.

(d) APPLICABILITY- Sections 4061, 6036, and 9061 of title 10, United States Code, as added by this section, apply with respect to fatalities that occur on or after the date of the enactment of this Act.

SEC. 577. SENSE OF CONGRESS.

It is the sense of Congress that--

(1) the Secretary of Defense should develop a Department of Defense strategic plan for domestic violence that incorporates the core principles of domestic violence intervention identified by the Defense Task Force on Domestic Violence in its third annual report under section 591(e) of the National Defense Authorization Act for Fiscal Year 2000 (Public Law 106-65; [10 U.S.C. 1562](#) note); and

(2) the Secretary of each military department should establish and support a Victim Advocate Protocol as recommended by the Defense Task Force on Domestic Violence.

INFORMATION PAPER

DAJA-CL

22 December 2003

SUBJECT: Changes to Transitional Compensation Program ([10 USC 1059](#)) and Travel Benefits

1. **Purpose.** To provide information to Staff Judge Advocates, victim witness liaisons and Family Advocacy Program (FAP) managers concerning recent changes to the Transitional Compensation Program and travel benefits.

2. **Discussion.**

a. The National Defense Authorization Act (NDAA) (PL 108-136, signed 24 Nov 03) made multiple changes to the Transitional Compensation statute ([10 USC 1059](#)).

b. Section 572(a)(i), NDAA changes the eligibility date for receipt of Transitional Compensation (TC) in court-martial proceedings. A qualifying family member may now receive TC as of **date of sentencing** if the adjudged sentence includes a dismissal, DD, BCD, or total forfeitures.

c. Section 572(a)(ii), NDAA addresses a narrow category of cases that involve a pretrial agreement (PTA) that provide for suspension or disapproval of the dismissal, DD, BCD, or total forfeitures. While such PTAs are not common, when they do occur, this section delays the eligibility date for TC until approval of the sentence by the convening authority and only where the sentence approved under such a pretrial agreement includes an unsuspended dismissal, DD, BCD or total forfeitures.

d. Section 574, NDAA amended the TC statute to authorize TC in both voluntary (Chapter 10) and involuntary administrative separations.

e. Section 572 (TC available upon sentencing) changes were effective for all courts-martial in which the sentence was adjudged on or after the date of enactment, 24 November 2003. Section 574 change (administrative separation proceedings) was also effective 24 November 2003.

f. Section 571, NDAA provides for travel and transportation of dependents in cases of domestic violence. Section 573, NDAA provides for TC in exceptional cases. However, both of these sections require Secretarial action (implementing regulations) to be effective. The Army Times article of 15 December 2003 incorrectly suggests that they are effective immediately.

3. **Full Text.** Full text of amendments is reproduced at the Enclosure [included previously].

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Approved by: COL Condrón, Chief, Crim
Law

APPENDIX 4

Appendix D Victim/Witness Checklist

D-1. Victim checklist

- a.* Coordinate with installation/community casualty working group and the U.S. Army Criminal Investigation Command Survivor Point of Contact in death cases ([18-2c](#)).
- b.* Ensure that victims are provided the name, location, and telephone number of the VWL (para [18-8b](#)).
- c.* Inform the victim of the right to receive the services described in chapter 18 (secs [III](#) and [V](#)) and provide a Victim and Witness Information Packet (para [18-9b](#)).
- d.* Inform the victim of the following rights (para [18-10](#)):
 - (1) The right to be treated with fairness, dignity, and a respect for privacy.
 - (2) The right to be reasonably protected from the accused offender.
 - (3) The right to be notified of court proceedings.
 - (4) The right to be present at all public court proceedings related to the offense, unless the court determines that testimony by the victim would be materially affected if the victim heard other testimony at trial, or for other good cause.
 - (5) The right to confer with the attorney for the Government in the case.
 - (6) The right to restitution, if appropriate.
 - (7) The right to information regarding conviction, sentencing, imprisonment, and release of the offender from custody.
- e.* Inform the victim of the availability of emergency medical and social care and, when necessary, provide appropriate assistance in securing such care (para [18-12a](#)).
- f.* Inform abused dependent victims of the availability of medical care for injuries resulting from abuse if the sponsor received a dishonorable or bad conduct discharge or dismissal for an offense involving abuse of the dependent victims.
- g.* Assist the victim in obtaining financial, legal, and other social service support by informing the victim of the military and/or civilian programs that are available to provide

counseling, treatment, and other support, to include available compensation through Federal, State, and local agencies (para [18-12b](#)).

h. Inform dependents of soldiers who are victims of abuse by the military spouse or parent of the possibility of payment of a portion of the disposable retired pay of the soldier under [10 U.S.C. 1408](#) or payment of transitional compensation benefits under [10 U.S.C. 1059](#) (para [18-12b\(7\)](#)).

i. Inform a victim that families of soldiers may be eligible for transportation and shipment of household goods regardless of the character of the soldier's discharge (para [18-12b\(8\)](#)).

j. Inform the victim of the various means available to seek restitution (Article 139, UCMJ; other remedies, such as claims, private lawsuits, or any State compensation programs) and of appropriate and authorized points of contact (para [18-16b](#)).

k. Inform a victim concerning the stages in the military criminal justice system, the role that they can be expected to play in the process, and how they can obtain additional information concerning the process and the case (para [18-13](#)).

l. Inform a victim that the victim may receive notice of the following significant events in the case (para [18-14a](#)):

(1) The status of the investigation of the crime, to the extent that it will not interfere with the conduct of the investigation, the rights of the accused, or the rights of other victims or witnesses.

(2) The apprehension of the suspected offender.

(3) The preferral or dismissal of charges.

(4) The initial appearance of the suspected offender before a judicial officer at a pretrial confinement hearing or at an [Article 32, UCMJ](#), investigation.

(5) The scheduling of each court proceeding that the victim is either required or entitled to attend and of any scheduling changes.

(6) The detention or release from detention of an offender or suspected offender.

(7) The acceptance of a plea of guilty or the rendering of a verdict.

(8) The opportunity to provide evidence in aggravation of financial, social, psychological, and physical harm.

(9) The result of trial.

(10) If the sentence includes confinement, the probable parole date.

(11) General information regarding the corrections process, including information about forms of release from custody, and the offender's eligibility for each.

(12) The right to request notice of the offender's confinement or parole status.

(13) The opportunity to submit a victim impact statement to the Army Clemency and Parole Board.

m. Advise a victim that ordinarily the victim may consult with a Government representative concerning the following decisions (para [18-15](#)):

(1) Decisions not to prefer charges.

(2) Decisions concerning pretrial restraint.

(3) Pretrial dismissal of charges.

(4) Negotiations of pretrial agreements and their terms.

n. Advise a victim that all noncontraband property that has been seized or acquired as evidence will be safeguarded and returned as expeditiously as possible. Inform a victim of applicable procedures for requesting return of property. (See para [18-16a](#).)

o. Inform the victim that the victim's interests are protected by criminal sanctions; that any attempted intimidation, harassment, or other tampering should be promptly reported to military authorities; and that their complaints will be promptly investigated and appropriate action will be taken (para [18-19](#)).

p. Inform the victim that, within the guidelines of R.C.M. 701(e) and upon request, the VWL may act as an intermediary between the victim and representatives of the Government and the defense for the purpose of arranging witness interviews in preparation for trial (para [18-19d](#)).

q. Use best efforts to apprise a victim's chain of command of the necessity for the victim's testimony (and the inevitable interference with and absence from duty) (para [18-18](#)).

r. Inform a victim that, upon request, reasonable steps will be taken to inform an employer should the victim's innocent involvement in a crime or in the subsequent military justice process cause or require absence from work (para [18-20](#)).

s. Inform the victim that, upon request, reasonable steps will be taken to explain to a creditor when the victim, as a direct result of an offense or of cooperation in the investigation or prosecution of an offense, is subjected to serious financial hardship (para 18-20).

- t. Inform the victim of the availability of a separate waiting area (para [18-19c](#)).
- u. Inform the victim of, and provide appropriate assistance to obtain, available services such as transportation, parking, child care, lodging, and court-martial translators/interpreters (para [18-23](#)).
- v. Inform the victim that witnesses requested or ordered to appear at Article 32 investigations or courts-martial may be entitled to reimbursement for their expenses under Articles 46 and 47, UCMJ; R.C.M. 405(g); AR 37-106; and chapter [5](#) of this regulation (para 18-21).
- w. Assist the victim in obtaining timely payment of witnesses fees and related costs and coordinate with local finance officers for establishing procedures for payment after normal duty hours if necessary (para [18-21](#)).
- x. For the trial counsel or designated Government representative.
- (1) No later than after trial if the offender is sentenced to confinement, advise the victim of the offender's place of confinement and the offender's projected minimum release date and determine whether the victim desires to be notified of the offender's confinement or parole status changes or consideration for parole or clemency by using [DD Form 2703](#) (para [18-14b](#)).
- (2) In all cases, record the victim's election regarding notification of changes in confinement status using DD Form 2704. Give one copy to the victim; forward one copy of the form to the commander of the gaining confinement facility; forward one copy of the form to the Army's central repository, Headquarters, Department of the Army, Office of the Deputy Chief of Staff, [G-3](#), U.S. Army Military Police Operations Agency (ATTN: DAMO-ODL), 4401 Ford Avenue, Suite 225, Alexandria, VA 22302-1432 (para [18-14b](#)).
- (3) Do not attach DD Form 2704 to any portion of a record to which the offender has access (para 18-14b).
- y. Process the victim's requests for investigative reports or other documents under applicable Freedom of Information or Privacy Act procedures. However, in appropriate cases, the SJA may otherwise authorize release of a record of trial to a victim when necessary to ameliorate the physical, psychological, or financial hardships suffered as a result of the criminal act. (See para [18-24](#).)

D-2. Witness checklist

- a.* Coordinate with installation/community casualty working group and the U.S. Army Criminal Investigation Command Survivor Point of Contact in death cases (para [18-2c](#)).
- b.* Ensure that witnesses are provided the name, location, and telephone number of the VWL (para [18-8b](#)).
- c.* Inform each witness of the right to request the services described in this chapter (secs IV and V) and provide a Victim/Witness Information Packet ([DD Forms 2701](#) and [2702](#)) when necessary or requested (para [18-9b](#)).
- d.* Inform a witness concerning the stages in the military criminal justice system, the role that they can be expected to play in the process, and how they can obtain additional information concerning the process and the case (para [18-17b](#)).
- e.* Inform the witness regarding notification of the following significant events in the case (para [18-17](#)):
 - (1) The status of the investigation of the crime, to the extent that it will not interfere with the conduct of the investigation, the rights of the accused, or the rights of other victims or witnesses.
 - (2) The apprehension of the suspected offender.
 - (3) The preferral or dismissal of charges.
 - (4) The initial appearance of the suspected offender before a judicial officer at a pretrial confinement hearing or at an [Article 32, UCMJ](#) , investigation.
 - (5) The scheduling (date, time, and place) of each court proceeding that the witness is either required or entitled to attend and of any scheduling changes.
 - (6) The detention or release from detention of an offender or suspected offender.
 - (7) The acceptance of a plea of guilty or the rendering of a verdict after trial.
 - (8) The result of trial.
 - (9) If the sentence includes confinement, the probable parole date.
 - (10) General information regarding the corrections process, including information about forms of release from custody, and the offender's eligibility for each.
 - (11) In appropriate cases, inform the witness of the right to request notice of the offender's confinement or parole status.

(12) Inform the witness that the witness' interests are protected by criminal sanctions, that any attempted intimidation, harassment, or other tampering should be promptly reported to military authorities, and that complaints will be promptly investigated and appropriate action will be taken (para [18-19](#)).

(13) Inform the witness that the VWL may act as an intermediary between a witness and representatives of the Government and the defense for the purpose of arranging witness interviews in preparation for trial, within the guidelines of R.C.M. 701(e) and upon request (para [18-19d](#)).

(14) Use best efforts to apprise a witness' chain of command of the necessity for the witness' testimony (and the inevitable interference with and absence from duty). (See para [18-18](#).)

(15) Inform a witness that, upon request, reasonable steps will be taken to inform an employer should the witness' innocent involvement in a crime or in the subsequent military justice process cause or require absence from work (para [18-20](#)).

(16) Inform the witness that, upon request, reasonable steps will be taken to explain to a creditor when the witness, as a direct result of an offense or of cooperation in the investigation or prosecution of an offense, is subjected to serious financial hardship (para 18-20).

(17) Inform the witness of the availability of a separate waiting area (para [18-19c](#)).

(18) Inform the witness of, and provide appropriate assistance to obtain, available services such as transportation, parking, child care, lodging, and court-martial translators/interpreters (para [18-23](#)).

(19) Inform the witness that witnesses requested or ordered to appear at Article 32 investigations or courts-martial may be entitled to reimbursement for their expenses under Article 46 and 47, UCMJ; R.C.M. 405(g); AR 37-106; and chapter [5](#) of this regulation (para 18-21).

(20) Assist the witness in obtaining timely payment of witnesses fees and related costs and coordinate with local finance officers for establishing procedures for payment after normal duty hours if necessary (para [18-21](#)).

f. For the trial counsel or designated Government representative.

(1) No later than after trial if the offender is sentenced to confinement advise the witness of the offender's place of confinement and the offender's projected minimum release date.

(2) In all cases, advise the witness regarding the right to be notified of the offender's confinement or parole status changes or consideration for parole or clemency by using [DD Form 2703](#) (para [18-17](#)).

g. For the VWL or designated Government representative.

(1) In all cases, complete [DD Form 2704](#) regarding the witness' election regarding notification of changes in confinement status and give one copy to the witness; forward one copy of the form to the commander of the gaining confinement facility; and forward one copy of the form to the Army's central repository, Headquarters, Department of the Army, Office of the Deputy Chief of Staff, [G-3](#), U.S. Army Military Police Operations Agency (ATTN: DAMO-ODL), 4401 Ford Avenue, Suite 225, Alexandria, VA 22302-1432 (para 18-17).

(2) Do not attach DD Form 2704 to any portion of a record to which the offender has access (para [18-17b](#)).

h. Process a witness' request for investigative reports or other documents under applicable Freedom of Information or Privacy Act procedures (para [18-24](#)).

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